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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

AZTEC FORECLOSURE
CORPORATION,

Plaintiff,

v.

DEBBIE JO CHILCOTT,

Defendant and Respondent;

TADD D. CHILCOTT,

Defendant and Appellant.

E062834

(Super.Ct.No. MCC1401212)

OPINION

APPEAL from the Superior Court of Riverside County. Eric Isaac, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Affirmed.

Law Office of Thomas W. Sardoni, Thomas W. Sardoni and Daniel L. Schnebly for Defendant and Appellant.

The Grant Law Firm, Miles D. Grant and Alexander J. Kessler for Defendant and Respondent.

No appearance for Plaintiff.

Defendant and appellant Tadd Chilcott appeals the court's order on a petition of unresolved claims and deposit of undistributed surplus (Petition). Plaintiff Aztec Foreclosure Corporation (Aztec)¹ filed the Petition pursuant to Civil Code section 2924j in order to resolve the proper disbursement of surplus funds after the home located at 43925 El Lucero Place in Temecula (Property) was sold at a trustee's sale.

Tadd² owned the Property as a single man. Tadd had filed a homestead declaration prior to the trustee's sale. However, his ex-wife, defendant and respondent Debbie Chilcott, had a lien against the property for a judgment obtained against Tadd during their divorce. After the sale, there was a surplus of funds and Aztec filed the Petition to determine the proper party to be awarded the surplus funds. The court awarded the surplus funds to Debbie, finding that Tadd had not complied with the directives of Civil Code section 2924 by failing to file a claim for the funds directly with the court. Tadd's motion for relief from default filed pursuant to Code of Civil Procedure sections 473.5 and 473, subdivision (b) was denied.

Tadd basically raises two claims. First, the court erred by ordering that Debbie receive the surplus funds because his homestead declaration had priority over her judgment lien. Second, his motion for relief from default should have been granted. We

¹ Aztec was served with the notice of appeal and appellant's opening brief but did not file a response.

² Since the parties share the same last name, in order to avoid confusion, we refer to them by their first names; no disrespect is intended.

deny both claims. The court properly concluded that Tadd did not comply with Civil Code section 2924j. Further, the issue of Tadd's noncompliance was fully discussed and litigated at the time of the original hearing. Tadd's motion for relief from default was properly denied to the extent he sought review of that finding. Moreover, the court did not abuse its discretion by finding that his motion for relief from default failed on its merits.

FACTUAL AND PROCEDURAL HISTORY

A. TRUSTEE'S SALE AND FILING OF THE PETITION

Tadd purchased the Property in 2003 as an unmarried man. The deed of trust in the amount of \$795,000 was held by Merrill Lynch. Tadd filed a homestead declaration in 2008. Tadd defaulted on his payments. Foreclosure proceedings were started. Aztec stepped in as the trustee of the Property and sold it at a trustee's sale on March 20, 2014, for the amount of \$805,000. After all of the fees were paid, there was a surplus of \$98,280.56.

Aztec searched the records for liens against the Property and Tadd. Pertinent here, Aztec discovered an abstract of judgment in the amount of \$1,654,000 in favor of Debbie filed on July 26, 2011. A judgment in favor of Jumania, Inc., a California Corporation dba TAC International (Jumania) in the amount of \$384,219.58 was filed on May 10, 2012. Finally, there was an abstract of judgment in favor of S&S Active Wear, LLC (S&S) in the amount of \$8,669.09 filed on August 2, 2012.

Aztec sent notice of the surplus to the claimants. Debbie had sent a claim for the surplus funds to Aztec on April 23, 2014, and insisted her judgment, with interest and

penalties, totaled \$2,124,511.52; Jumania submitted a claim to Aztec for \$467,585.50; and S&S submitted a claim of surplus funds to Aztec in the amount of \$10,711.44. Tadd sent a request directly to Aztec for the surplus funds in April 2014. In it he claimed, based on his homestead declaration recorded on May 30, 2008, that he was entitled to \$100,000. Aztec could not determine the priority of the claims. In particular, it could not determine whether Tadd's homestead exemption claim of \$100,000 had priority (or was even relevant to disbursement of surplus funds) over the senior judgment lien held by Debbie.

Aztec filed the Petition on August 26, 2014. Aztec included a proof of service for its notice of intent to deposit funds from the trustee sale with the clerk of the court pursuant to Civil Code section 2924j, subdivision (d) on August 19, 2014. Tadd was served both at the Property address and at another address located on Corte La Puente in Temecula.

The matter was set for hearing on October 6, 2014. The matter was continued in order for the clerk of the court to send notice of the hearing to all parties. Tadd was served the notice of hearing at the Property and Corte La Puente addresses.

On September 18, 2014, Debbie filed in the court her claim to undistributed surplus proceeds of trustee's sale. She relied upon Civil Code section 2924j, subdivision (c) as authority for submitting her claim. She claimed she had the most senior lien on the Property at the time of the trustee's sale. Debbie had obtained the judgment from their divorce on April 28, 2011.

On October 6, 2014, S&S filed its affidavit of claim for surplus funds in the court. S&S declared it had an abstract of judgment filed against the Property prior to the trustee's sale. On October 24, 2014, Jumania also filed an affidavit of claim for surplus funds in the court. It insisted it had an abstract of judgment filed against the Property prior to the trustee's sale. Tadd filed nothing.

B. HEARING ON THE PETITION

The Petition was heard on November 13, 2014. Present at the hearing were counsel for Aztec, Tadd and Debbie. Tadd personally appeared. Debbie's counsel argued that "[t]he Court can only consider claims filed within 15 days before the date of this hearing, which was October 29th." Debbie had the oldest lien and should be awarded the surplus funds.

Tadd's counsel contended his firm had been retained the morning of the hearing. Tadd had informed counsel that he received notice of the hearing, but had not received the Petition. Aztec's counsel contended, "there is no way that he didn't have notice of this a long time ago." Aztec's counsel referred to the claim submitted to Aztec by Tadd in April 2014 for the surplus funds prior to the Petition even being filed.

Tadd's counsel agreed that Tadd had sent the request for surplus funds to Aztec, but had not been served with the Petition. Aztec referred to the proof of service dated August 19, 2014, which showed that Tadd was served at two addresses. Tadd's counsel acknowledged the proof of service, but stated that Tadd did not receive actual notice that he was required to file a claim for the surplus funds with the court. He argued, "It seems to me this is grounds for relief under—written relief from default either based on actual

notice or based on—based on surprise, excusable neglect, or mistake. . . . Based on that, I would request the hearing be continued and he be given leave to file a claim.”

Tadd was then asked about the notice received. He stated he only received notice of the hearing, and not the Petition. He received notice of the hearing directly from the court by mail. Tadd denied that he received the notice of intent to deposit funds sent by Aztec on August 19, 2014. He admitted that he lived at the Corte La Puente address. The proof of service stated that he was sent the notice to that address.

Debbie’s counsel argued that even if Tadd did not receive the Petition, he got notice of the hearing more than 15 days prior to the hearing. Since Tadd did not comply with Civil Code section 2924j, the court could not consider his claim.

The court first noted that notice of the hearing on the Petition was mailed on September 2, 2014. Tadd had to have received it more than 15 days prior to the hearing date. The court noted, “[a]nd I tend to agree with [Debbie’s counsel] . . . that, . . . even for the sake of argument if you did not receive that proof of service, you, by your own admission, received that. Surely, you received that more than 15 days prior to this hearing. And you have come to court today with an attorney that you retained today, but did not follow the code by submitting a claim, so I think it’s untimely. . . . I think that pursuant to the code, I am bound to follow that rule, and the funds should go to the claimant, [Debbie]. So that would be the order of the court.”

Tadd’s counsel argued that the relief from default statutes, due process and public policy favored cases being heard on their merits. The law favored granting relief if there was no actual notice or if there was mistake, inadvertence or surprise. The court rejected

the claim. It found, “[b]y your client’s own admission that even if he didn’t receive, which I find highly suspect, because it went to the same address as that letter you’ve shown the Court, but even by that letter, which is dated September 2nd, we’re now November 13th, you know, so it’s well outside, so I don’t see the surprise, the mistake that you keep referring to. [¶] He had notice of this hearing, sir. Where is the—just because he decided just today to hire an attorney, I don’t understand how you’re now saying that there is some type of surprise or mistake. He received notice. He didn’t follow the rules, so what is it that he is surprised by?”

Tadd’s counsel responded that Tadd was not an expert in the Civil Code or Code of Civil Procedure. Counsel asked for a continuance so that the case could be decided on its merits. Counsel argued that Tadd had a statutory homestead exemption which was senior to any of the judgment liens. Further, Tadd had submitted his claim to Aztec and thought that was all he needed to do to preserve his claim. The court denied the request to continue the case.

C. EX PARTE MOTION FOR RELIEF FROM DEFAULT

Tadd filed a notice of motion and motion for relief from default pursuant to Code of Civil Procedure sections 473, subdivision (b) and 473.5, and for leave to file a late claim under Civil Code section 2924j, subdivision (d). The grounds for relief were that (1) Tadd did not receive actual notice of the statutory requirement to file a claim for the surplus funds with the court; (2) because of mistake, inadvertence, surprise or excusable neglect, he mistakenly believed his claim filed with Aztec was sufficient; (3) public

policy strongly supports the preservation of judgment debtors' homestead exemptions; and (4) no legal prejudice will accrue to any of the parties in interest.

Tadd admitted receiving the notice of hearing on September 4, 2014. He did nothing, believing that the submission of his claim to Aztec was all that was needed in order to preserve his claim. Tadd never received the Petition. He included a letter from Aztec dated April 14, 2014, requesting him to notify them if he had a claim for the surplus. It was sent to the Property address and he clearly received it. He also included the claim he sent to Aztec and the notice he received at the Corte La Puente address from the court regarding the hearing.

Tadd also filed, on November 26, 2014, an ex parte application for relief to stay the November 13, 2014 order. He sought to stay the disbursement of funds to Debbie.

D. RULING

The ex parte matter was heard on December 1, 2014. Counsel for Debbie, Aztec and Tadd were all present. Debbie's counsel argued that the matters in the motion for relief from default were already addressed at the previous hearing. There was nothing new in the motion for relief from default. Tadd's counsel stated that it filed the noticed motion to provide further support for relief. The court then took a recess in order for it to review the motion for relief that had been filed.

After the recess, the trial court stated it had been able to "skim" the motion, but had not read it in depth; however, the court noted that the motion for relief from default addressed actual notice to Tadd, which had already been decided at the first hearing. The

court had also addressed at the first hearing excusable neglect, mistake, inadvertence and surprise. There were no new issues addressed in the written motion.

Tadd's counsel acknowledged the issues had been discussed at the first hearing, but that the written motion provided legal authorities to support the claim. The court ruled, "Counsel, based on what I see, I'm going to deny the request to set aside this Court's November 13th order. If you want to appeal, that's your right. But from what I see, I see no new issues."

The order to distribute surplus proceeds of trustee's sale to Debbie was filed on December 1, 2014. Tadd filed his notice of appeal on January 29, 2015. His appeal was from the orders of the court ordering distribution of the surplus proceeds of the trustee's sale and the denial of his ex parte application to stay the November 13, 2014, order; and vacating Tadd's motion for relief from default and leave to file a late claim under Civil Code section 2924j, subdivision (d).

A judgment or order resolving priority claims and releasing surplus funds under Civil Code section 2924j may be treated as final and appealable. (See *Wells Fargo Bank v. Neilsen* (2009) 178 Cal.App.4th 602, 608-609; *CTC Real Estate Services v. Lepe* (2006) 140 Cal.App.4th 856, 859-860.)

DISCUSSION

A. CIVIL CODE SECTION 2924j: DISTRIBUTION OF SURPLUS FUNDS

Initially, we conclude the court properly awarded the surplus funds to Debbie because Tadd failed to follow the simple procedures set forth in Civil Code section 2924.

“Section 2924h provides that, after a non-judicial foreclosure sale, where there are proceeds remaining after the payment of (a) the costs and expenses of the sale, including trustee fees and attorney fees . . . the obligation secured by the deed of trust or mortgage which was the subject of the sale . . . ‘the trustee shall send written notice to all persons with recorded interest in the real property.’” (*Wells Fargo Bank v. Neilson, supra*, 178 Cal.App.4th at p. 614.) In other words, first priority is given to the payment of the trustee’s fees, and second, to the payment of the lien that was the subject of the trustee’s sale. (*Ibid.*; Civ. Code, § 2924k, subds. (a)(1) & (a)(2).) If any surplus remains, it goes “[t]o satisfy the outstanding balance of obligations secured by any junior liens or encumbrances in the order of their priority.” (*Wells Fargo*, at pp. 614-615; Civ. Code, § 2924k, subd. (a)(3).) “[S]ections 2924j and 2924k clearly define the trustee’s responsibilities concerning surplus funds.” (*Banc of America Leasing & Capital, LLC v. 3 Arch Trustee Services, Inc.* (2009) 180 Cal.App.4th 1090, 1102.)

Civil Code section 2924j, subdivision (a), provides that the trustee must provide notice to all persons with a recorded interest in the property sold, that they should notify the trustee whether the claimant wants to pursue the claim. Here, Tadd did file notice with Aztec.

Civil Code section 2924j, subdivision (b) provides that if, after acting with due diligence, the trustee is not able to resolve conflicts between claimants or determine the priority of the claims submitted to him or her, then within a specified amount of time, the trustee must either file an interpleader action or deposit the funds with the clerk of the court and file a declaration of unresolved claims. Section 2924j, subdivision (d) provides

that “Before the trustee deposits the funds with the clerk of the court . . . the trustee shall send written notice by first-class mail, postage prepaid, to all persons described in subdivision (a) informing them that the trustee intends to deposit the funds with the clerk of the court and that a *claim for the funds must be filed with the court within 30 days from the date of the notice*, . . . [¶] Within 90 days after deposit with the clerk, the court shall consider all claims filed at least 15 days before the date on which the hearing is scheduled by the court.” (Italics added.)

““When construing a statute, we must “ascertain the intent of the Legislature so as to effectuate the purpose of the law.” [Citation.] The words of the statute are the starting point. “Words used in a statute . . . should be given the meaning they bear in ordinary use. [Citations.] If the language is clear and unambiguous there is no need for construction, nor is it necessary to resort to indicia of the intent of the Legislature.””” (Azadozy v. Nikoghosian (2005) 128 Cal.App.4th 1369, 1373.)

The language of Civil Code sections 2924h and 2924j are clear. They outline the duties of the trustee in determining how to disburse surplus funds after a nonjudicial foreclosure sale. They also provide specific guidelines to the claimant to preserve his or her rights. Here, if Tadd wanted to preserve his claim, he had to file his claim with the court 15 days prior to the hearing. Even assuming Tadd had a valid lien against the surplus proceeds, he did not perfect his rights by failing to file a written claim with the court.

Tadd argues that if the Legislature intended that the court could only consider claims filed 15 days prior to the hearing, it would not have included the language in Civil Code section 2924j, subdivision (c), that “the trustee shall submit a copy of the trustee’s sales guarantee and any information relevant to the identity, location, and priority of the potential claimants with the court.” However, the language is clear that the trustee must submit the names of “potential claimants.” This does not conflict with subdivision (d), as it refers to “claims” actually filed with the court. Subdivision (d) mandates, i.e. “a claim for the funds must be filed with the court,” that all potential claimants file a claim with the court prior to the hearing on the disbursement of surplus funds in order to be considered for distribution. The language is clear that the claim must be filed with the court and that the court can only consider those claims.

Tadd appears to argue that the surplus funds were “exempt” for a period of six months pursuant to Code of Civil Procedure section 704.960, subdivision (b). That provision provides if after a declared homestead has been voluntarily sold, the proceeds of the sale are exempt in the amount provided by Code of Civil Procedure section 704.730 for a period of six months so that the proceeds can be invested in a new dwelling.

Tadd never made this argument in the lower court. Tadd argued that his homestead declaration was senior to any other liens. He never argued the funds were exempt from the liens, nor present any facts or legal argument supporting such a claim. He never presented any facts as to what occurred at the trustee’s sale and if the homestead exemption was considered. “[W]e ignore arguments, authority, and facts not

presented and litigated in the trial court.” (*Bialo v. Western Mutual Ins. Co.* (2002) 95 Cal.App.4th 68, 73.)

Moreover, Tadd contends that there is a strong public policy in favor of preserving a judgment debtor’s homestead exemption. Although he made a similar argument in the lower court, on appeal, he appears to argue that the court should have ignored Civil Code section 2924j and declared his homeowner’s exemption took priority despite his failure to comply. Tadd never made this argument in the lower court, either at the first hearing or in his motion for relief from default. Tadd essentially conceded that Civil Code section 2924j applied. He acknowledged he failed to file his claim with the court. To the extent that Tadd is arguing that the lower court should have ignored the directives of Civil Code section 2924j, such claim was not raised below and will not be considered for the first time on appeal. (*Bialo v. Western Mutual Ins., Co., supra*, 95 Cal.App.4th at p. 73.) Moreover, we find no authority for his claim that his homestead exemption somehow was not subject to Civil Code section 2924j.

Based on Tadd’s failure to comply with the directives of Civil Code section 2924, and his failure to argue in the lower court that it should not have applied Civil Code section 2924 to his homeowner’s exemption, the court properly awarded the surplus funds to Debbie.

B. MOTION FOR RELIEF FROM DEFAULT

Tadd contends that the court should have granted his motion for relief from default pursuant to Code of Civil Procedure section 473.5 because he failed to receive actual notice that he had to file a claim with the court pursuant to Civil Code section 2924j,

subdivision (d). In addition, he contends that the court should have granted his motion for relief from default under Code of Civil Procedure section 473, subdivision (b) due to mistake, inadvertence, surprise or inexcusable neglect. We need not consider whether a motion for relief from default under Code of Civil Procedure section 473.5 or 473, subdivision (b), applied to the default under Civil Code section 2924, because assuming the provisions applied, he was not entitled to relief.³

“A motion to vacate a default and set aside a judgment ([Code Civ. Proc.,] § 473) ‘is addressed to the sound discretion of the trial court, and in the absence of a clear showing of abuse . . . the exercise of that discretion will not be disturbed on appeal.’ [Citations.] The appropriate test for abuse of discretion is whether the trial court exceeded the bounds of reason.” (*Anastos v. Lee* (2004) 118 Cal.App.4th 1314, 1318-1319.)

Section 473.5 provides in pertinent part: “(a) When service of a summons has not resulted in actual notice to a party in time to defend the action and a default or default judgment has been entered against him or her in the action, he or she may serve and file a notice of motion to set aside the default or default judgment and for leave to defend the action.” “Discretionary relief based upon a lack of actual notice under section 473.5 empowers a court to grant relief from a default judgment where a valid service of summons has not resulted in actual notice to a party in time to defend the action.

³ Debbie has claimed that Tadd is not entitled to relief on a default for a failure to comply with Civil Code section 2924j under Code of Civil Procedure sections 473.5 and 473, subdivision (b).

[Citation.] A party seeking relief under section 473.5 must provide an affidavit showing under oath that his or her lack of actual notice in time to defend was not caused by inexcusable neglect or avoidance of service.” (*Anastos v. Lee, supra*, 118 Cal.App.4th at p. 1319.)

The court rejected, at the first hearing, that Tadd did not receive actual notice. In fact, the court stated that it found Tadd’s statement he did not receive the “Petition” to be “highly suspect.” Further, even if he did not receive the Petition, the court found he received notice of the hearing, which was sent on September 2, giving him plenty of notice prior to the hearing. Tadd provided in his declaration that he lived at the Corte La Puente address after the foreclosure. He admitted he received the letter regarding making a claim directly with Aztec for the homestead exemption. Tadd also received the notice of hearing from the court. He admitted that the hearing notice stated that it was in reference to a petition filed regarding unresolved claims pursuant to Civil Code section 2924j. Tadd only declared that he “believed” he had complied with the requirements for making a claim. Moreover he simply stated that he did not receive the Petition.

Initially, the court properly determined that the motion for relief from default raised no new issues and that the matters in the motion had already been litigated. Moreover, the court did not abuse its discretion by determining that Tadd was served with the Petition. Additionally, once he received the notice of the hearing, which stated it was in reference to a petition filed pursuant to Civil Code section 2924j, he certainly had some obligation to determine the nature of the action. If he had read Civil Code section

2924j, the requirements were clear. The court properly denied the motion for relief from default claim under Code of Civil Procedure section 473.5.

The court also did not abuse its discretion by finding that the motion for relief for default filed under Code of Civil Procedure section 473, subdivision (b) lacked merit. That section provides in pertinent part, “The court may, upon any terms as may be just, relieve a party or his or her legal representative^[4] from a judgment, dismissal, order, or other proceeding taken against him or her through his or her mistake, inadvertence, surprise, or excusable neglect.” Initially, assuming that this section applies to the failure to comply with Civil Code section 2924, the court properly determined that those issues were already determined at the first hearing and the motion for relief from default presented no new argument. Additionally, Tadd’s affidavit did not establish surprise, neglect or inadvertence. Tadd never averred that he had reviewed Civil Code section 2924j and did not understand it. As found by the court, he had notice both by being served with the Petition and the hearing notice that referenced Civil Code section 2924j. He chose not to read the provisions. There was no support for his claim of mistake, inadvertence or surprise.

The court properly denied Tadd’s motion for relief from default under both Code of Civil Procedure sections 473.5 and 473, subdivision (b).

⁴ Tadd cannot claim inadvertence, mistake or surprise of counsel because he admitted he hired counsel on the day of the hearing.

DISPOSITION

The order of the court is affirmed. Respondent is awarded her costs on appeal.

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MILLER
J.

We concur:

McKINSTER
Acting P. J.

CODRINGTON
J.